82-1150

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HOWARD ELLIS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

ALLEN L. FAILS, et al.,

Petitioners,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,

Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

THE DECISIONS BELOW

Opinions and Judgment of the U.S. Court of Appeals for the Ninth Circuit

685 F.2d 1065 (1982)

Howard ELLIS, et al.,
Plaintiffs/Appellants,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

Allen FAILS, et al.,
Plaintiffs/Appellants,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, et al.,
Defendants/Appellees.

Nos. 80-5562, 80-5603.

United States Court of Appeals,
Ninth Circuit.

Argued Nov. 2, 1981.

Submitted Feb. 22, 1982.

Decided Sept. 3, 1982.

[Headnotes and attorneys' names omitted.]

[1067] Appeal from the United States District Court for the Southern District of California.

Before PREGERSON and ALARCON, Circuit Judges, and WHELAN,* District Judge.

PREGERSON, Circuit Judge:

BACKGROUND

The Railway Labor Act, as amended in 1951, permits employers engaged in interstate rail or air commerce to include in collective bargaining contracts either a union shop or an agency fee provision. Railway Labor Act, § 2, subd. 11, 45 U.S.C. § 152, subd. 11 (hereafter "Section 2, Eleventh"). A union shop provision requires employees to join the union that represents their craft or class. 45 U.S.C. § 152, subd. 11(a). An agency fee provision requires employees to pay the union a fee equal to union dues, initiation fees, and assessments, but does not require employees actually to join the union. 45 U.S.C. § 152, subd. 11(b). Such provisions prevent "free riders" from reaping the benefits of collective bargaining without contributing financial support to the union's efforts. In *Railway Employees' Department v. Hanson*, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956), the Supreme Court upheld the constitutionality of such financial support requirements, specifically rejecting contentions that a union shop provision violated the First and Fifth Amendment rights of protesting employees.

Five years later, in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1961), the Court reaffirmed *Hanson*, but construed the Railway Labor Act as prohibiting the union from using any portion of an employee's mandatory dues to support political and ideological causes once the employee has informed the union of his or her objection to those expenditures. That construction allowed the Court to avoid deciding the First Amendment challenge to the use of union dues to support political activities. That issue was not faced until 1977 when, in *Abood v. Detroit Board of Education*, 431 U.S. 209, 234, 97 S.Ct. 1782, 1799, 52 L.Ed.2d 261 (1977), the Court ruled that the First Amendment prohibits a union from financing political and ideological

*The Honorable Francis C. Whelan, Sr., United States District Judge, for the Central District of California, sitting by designation.

causes not germane to collective bargaining duties by using a portion of the dues of employees who object to advancing those causes.[1]

The instant action commenced in 1973, when appellants, a group of Western Airlines employees, challenged the dues payment obligation imposed by a union shop agreement.[2] The appellants contended that **[1068]** they could not be required to contribute to any union costs except those incurred for collective bargaining and grievance administration activities. They urged the district court to define the scope ofthose activities narrowly. Such a construction would entitle them to a substantial dues rebate.

In October 1975, the union (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, hereafter "BRAC") instituted a retroactive voluntary rebate program for employees who object to the use of a portion of their dues to support certain politica' or ideological causes not germane to collective bargaining. BRAC asserts that this rebate plan protects appellants' rights under *Street* and *Abood* with respect to union activities conceded by all to be "political" or "ideological."

Appellants contend that the plan still violates their First Amendment rights because it provides a rebate rather than an immediate dues reduction, thereby giving the union use of a portion of their dues for up to a full year. They also argue that the union kept inadequate records and could not account accurately for its expenditures.

Appellants next argue that they cannot be charged for certain major operating expenditures of the union. These expenditures were incurred for union activities that include: 1) Grand Lodge conventions; 2) Grand

1. *Hanson* recognized that the existence of union shop contracts raised "justiciable questions under the First and Fifth Amendments," 351 U.S. at 232-33, 76 S.Ct. at 718, but held that an employee could be required constitutionally to support the work of the union in the realm of collective bargaining. *Id.* at 235, 76 S.Ct. at 719. *Abood* prohibited the use of a protesting employee's dues to finance political causes not germane to the union's collective bargaining duties. The Court based its holding on the right of association guaranteed by the First and Fourteenth Amendments—but made no reference to any Fifth Amendment prohibition against such use of union dues. There is therefore no support for the employees' allegation in the instant case that BRAC's expenditures infringe upon their Fifth Amendment rights.

2. There were originally two separate actions, both filed in 1973. *Fails v. BRAC* was brought by employees who unwillingly joined BRAC to comply with a union shop agreement. *Ellis v. BRAC* was brought by employees hired prior to the effective date of the union shop agreement. The *Ellis* plaintiffs did not have to join the union, but were required to pay an agency fee equal to the union's initiation fee and union dues. The two actions were consolidated in early 1974.

Lodge litigation not having as its subject matter contract negotiation or administration; 3) Grand Lodge publications; 4) Grand Lodge social activities; 5) Grand Lodge death benefits; and 6) Grand Lodge organizing activities. Expenditures for these activities are not "political" or "ideological" and thus not governed by the narrow holdings of *Street* and *Abood*. Nonetheless, appellants interpret language in those and other opinions as indicating that such expenditures are not a part of the collective bargaining and grievance administration costs to which objecting employees can be required to contribute. BRAC responds that these activities are sufficiently germane to the collective bargaining process so that all employees under a union shop or agency fee arrangement should be required to shoulder their fair share of the cost of these traditional union activities.

In 1976, the district court granted appellants' summary judgment motion, holding in paragraph twenty-two of its ruling that the major operating expenditures in question (denominated "Paragraph 22" expenditures or activities) were not incurred for collective bargaining activities. The court thus ruled as a matter of law that protesting employees could not be forced to support the activities listed above through compulsory dues payments. BRAC sought 28 U.S.C. § 1292(b) certification, arguing that the district court's ruling, which covered the liability issues, extended a dissenter's entitlement to a rebate beyond the area of political and ideological expenditures. The district court issued the certification but this court declined to hear the matter until after a trial on the damages issues. (*BRAC v. Ellis*, No. 76-8143, June 7, 1976.)

The district court tried the damages claims in 1978. With respect to certain expenditures, conceded by the union to be political and ideological, the court held that the union's rebate plan fully protected plaintiffs' interests. The court then found that approximately forty per cent of the Grand Lodge's annual expenditures had been for Paragraph 22 activities, *i.e.*, the six activities listed above. The court ruled that these expenditures, as well as minimal Paragraph 22 expenditures made by the Local Lodges and intermediate System Boards, had to be refunded to protesting employees.[3]

3. The court found that the Local Lodges engaged in "almost no" Paragraph 22 expenditures; by stipulation, plaintiffs were awarded $1.00 per year from dues paid to their Local Lodge. The court likewise found that the System Boards engaged in "little" Paragraph 22 activity. Each plaintiff was awarded a rebate of approximately $4.00 for 1975 and 1976, and $1.00 per year for all other years from the date of his or her original protest.

[1069] The protesting employees appealed the decision, contending: (1) that the court erred in declining to adjudicate their First Amendment claims; 2) that the court applied the wrong standard of proof; 3) that the damages award is inadequate because the court did not require the union to account accurately for its expenditures; 4) that the court erred in cutting off plaintiffs' discovery rights six months before trial; and 5) that the court erred in refusing to consider evidence uncovered by plaintiffs after the trial but before judgment had been rendered.

The union challenged the court's summary judgment ruling that the six activities enumerated in Paragraph 22 are not germane to collective bargaining.

I. BRAC'S EXISTING POLITICAL-IDEOLOGICAL REBATE PLAN

In *BRAC v. Allen*, 373 U.S. 113, 83 S.Ct. 1158, 10 L.Ed.2d 235 (1963), the Supreme Court grappled with the problem of providing a practical and adequate remedy to employees who object to a union's political and ideological expenditures. The Court stated: "The difficulties in judicially administered relief . . . should, we think, encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy." *Id.* at 122, 83 S.Ct. at 1163.

Pursuant to that suggestion, BRAC instituted a voluntary rebate plan in late 1975. Under the program, a protesting employee receives a rebate on his or her pro rata share of all union disbursements for political and ideological activity as well as all legislative and lobbying costs, charitable donations, and fees for affiliations with other labor organizations. The Grand Lodge computes the rebate based on information submitted by subordinate units and on reports submitted by Grand Lodge personnel concerning time and funds spent for political and ideological purposes. Any employee who believes his or her rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals.

In Findings of Fact and Conclusions of Law rendered after the trial, the district court held that BRAC's voluntary rebate plan constituted a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *Street* and *Allen*.

A. *Appellants' Constitutional Challenge to the Plan*

[1] Appellants challenge the court-approved plan, arguing that it does not protect their First Amendment right to abstain from contributing in

the first place to the union's political activities. The program fails to pass constitutional muster, they contend, because it allows the union to collect and retain the full amount of a protesting employees' dues, use part of the dues for objectionable purposes, but not pay the rebate until the following year.

This claim is meritless. In *Street*, the court avoided adjudicating a First Amendment challenge to § 2, Eleventh of the Railway Labor Act by holding that the Act itself prohibited unions from forcing employees to support political causes which they oppose. 367 U.S. at 764, 81 S.Ct. at 1797. The Court then suggested two possible remedies to protect a dissenting employee, one of which was to provide "*restitution* to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed." *Id.* at 775, 81 S.Ct. at 1803. (Emphasis added.) By definition, an act of restitution entails the return of something —in this case, the rebate of a portion of the protesting employees' dues.

Abood squarely faced the constitutional issue avoided in *Street* and held that union members "may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." **[1070]** 431 U.S. at 234, 97 S.Ct. at 1799. *Abood* then cited *Allen's* suggestion that a voluntary internal union remedy would be appropriate and deferred further judicial proceedings pending implementation of the plan. *Id.* at 240-42, 97 S.Ct. at 1802-03. The rebate remedy formulated to avoid statutory violations was thus approved to protect against constitutional violations as well.

The Ninth Circuit has also approved the concept of a rebate plan as an effective safeguard of employees' rights. In *Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1131 (9th Cir. 1976), the court acknowledged that a rebate plan adopted the procedure outlined in *Allen*, and then held that the district court (Pregerson, J.) erred in granting summary judgment solely because there was a disputed question of fact whether the union would administer the rebate program in good faith. *Id.* at 1132. In the instant case, the fairness of the plan has been fully litigated.[4] The district court found that BRAC's rebate plan vindicated plaintiffs' rights. No showing has been made that this finding was clearly erroneous, and we refuse to disturb it.

4. Indeed, BRAC's program, by rebating such expenditures as charitable donations and fees for affiliations with other labor organizations, refunds more than the McDonnell Douglas/International Association of Machinists plan impliedly approved by *Seay*.

B. *The Standard of Proof Issue*

[2, 3] Appellants next assert—apparently with respect both to the rebate plan and Paragraph 22 expenditures—that the district court applied the wrong standard of proof. This claim is also without merit. Under *Allen, supra*, the union does bear the burden of proving the proportion of political to total union expenditures when employees protest the purpose of certain expenditures. 373 U.S. at 122, 83 S.Ct. at 1163. Generally in a civil case, the party with the burden of proof must persuade the trier of fact by a preponderance of the evidence. *Barr Rubber Products Co. v. Sun Rubber Co.*, 425 F.2d 1114, 1120 (2d Cir. 1970), *cert. denied*, 400 U.S. 878, 91 S.Ct. 118, 27 L.Ed.2d 115. *See also* E. Cleary, *McCormick's Handbook on the Law of Evidence* § 339 (1972). The district court applied the preponderance of evidence standard in the instant case. Appellants, however, contend that a higher standard of proof—proof by clear and convincing evidence—was required. In support of this contention they cite an unpublished opinion of the District Court of Maryland, *Beck v. C. W. A.*, M-76-839 (D.Md.1980). The *Beck* case was factually analogous to this case—it, too, was a spending protest—and the Special Master applied the clear and convincing evidence test "in view of the constitutional issues involved." However, the *Beck* Special Master did so relying solely on *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality opinion which held that a certain type of libel action had to be proved by clear and convincing evidence. That holding was extremely narrow and was not intended to extend to every case involving a constitutional claim. More importantly, *Rosenbloom* has been overruled on that very point. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974). It is true that the higher burden of proof by clear and convincing evidence is appropriate in a limited range of civil actions—for example, to prove charges of fraud and undue influence, see *McCormick, supra* at § 340(b)—but it is incorrect to assert that the higher burden is required every time a "constitutional issue" is involved. The trial court properly applied the preponderance of the evidence standard.

C. *The Accounting Challenge*

[4] Appellants next assert that the district court's decision that the voluntary rebate plan protects their abstention rights was clearly erroneous because the court did not require the union to conform its books and records to generally accepted accounting principles. As a result, the objecting employees argue, BRAC was unable to satisfy its *Allen* burden of proving the proportion of political to total union expenditures.

[1071] This claim is equally without merit. Immediately after it imposed the burden of proof on unions, the *Allen* court expressly stated that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required; we are mindful of the difficult accounting problems that may arise." 373 U.S. at 122, 83 S.Ct. at 1163. In this case, the district court recognized that its Paragraph 22 ruling would be appealed and thus declined to require the union to redo its recordkeeping procedures. BRAC did produce voluminous financial records and its witnesses explained the union's accounting methods in detail.

II. APPELLANTS' CLAIM OF PROCEDURAL ERRORS

A. *Termination of Discovery*

Appellants argue that the court abused its discretion when it halted discovery six months prior to trial. The court knew, appellants assert, that they intended to move to compel further answers with respect to the deposition of the union's president. They contend that BRAC obstructed efforts to obtain information throughout the discovery process. They also contend that they were left with no way to investigate the amounts of their on-going damages. Finally, they assert that the discovery ban deprived them of access to information pertaining to two of the union's trial exhibits.

[5, 6] A district court has wide latitude in controlling discovery; its rulings will not be overturned in the absence of a clear abuse of discretion. *Canadian American Oil Co. v. Union Oil Co. of California*, 577 F.2d 468, (9th Cir. 1978), *cert. denied* 439 U.S. 912, 99 S.Ct. 283, 58 L.Ed.2d 258. Appellants have failed to show any such abuse of discretion. As BRAC points out, appellants conducted extensive discovery for five years, including a full two years following the court's summary judgment ruling on Paragraph 22 expenditures. Moreover, the discovery ban was handed down on the scheduled date of the pre-trial conference; the court's ruling was, therefore, consistent with its Local Rule 9(d), then in effect, which specified that discovery "shall be completed, if possible, prior to the pre-trial conference."

B. *Denial of Motion to Supplement the Record*

Appellants contend that the trial court abused its discretion by refusing to receive post-trial evidence of a $20.00 BRAC assessment imposed on every employee to support a national strike against a different employer, the Norfolk and Western Railway. Appellants assert this expenditure should be rebated. They brought a motion to supplement the record based on F.R.Civ.P. 59, which allows the grant of a new trial on all or part of the

issues under certain circumstances, and on F.R.Civ.P. 60(b)(2), which allows the court to set aside a judgment when there is newly discovered evidence which by due diligence could not have been discovered earlier. Appellants contend that the offered evidence would demonstrate that part of the court's prospective relief—a $1.00 per year rebate from the Local Lodges and System Board—was grossly inadequate.

[7-9] A motion to reopen to submit additional evidence is addressed to the sound discretion of the trial judge. *Berns v. Pan American World Airways, Inc.*, 667 F.2d 826, 829 (9th Cir. 1982) and cases cited therein. The denial of a motion to vacate under F.R.Civ.P. 60(b) will be reversed only upon a clear showing of abuse of discretion. *United States v. Russell*, 578 F.2d 806, 807 (9th Cir. 1978). The same is true with respect to a motion to supplement the record brought under F.R.Civ.P. 59. *Johnson V. United States*, 270 F.2d 488, 492 (9th Cir. 1959), *cert. denied*, 362 U.S. 924, 80 S.Ct. 678, 4 L.Ed.2d 743 (1960). We do not believe the district court abused its broad discretion. As the union points out, the costs of a strike are germane to collective bargaining since a strike is one of the central methods employed in collective bargaining for improving wages and working conditions. The assessment in question should not be included in any rebate; the trial court's decision was therefore correct.

[1072]

III. THE DISTRICT COURT'S PARAGRAPH 22 RULING

[10] In reviewing the district court's Paragraph 22 ruling, we are faced with a definitional problem: Are the challenged union costs political-ideological expenditures that cannot be charged to protesting employees, or are such expenditures sufficiently germane to collective bargaining, so that all employees under a union shop or agency fee agreement must contribute toward their payment? A leading labor law casebook has described this issue as "the elusive problem left unresolved by the Supreme Court of defining the kinds of 'political' expenses which cannot lawfully be taxed against an unconsenting employee." A. Cox, D. Bok, R. Gorman, *Labor Law* 1184 (1977). The district court ruled on summary judgment that, as a matter of law, protesting employees cannot be required to help defray the union's expenditures challenged by the instant case. These conclusions of law are subject to *de novo* review. *State ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980).

Neither the Supreme Court nor the Ninth Circuit has considered the precise issue presented here. The Supreme Court, however, has used a variety of terms to delineate the extent of the dues obligation that can properly be imposed on a dissenting employee. Appellants urge a narrow

formulation of the dues requirement based on a statement in *Street* that "§ 2, Eleventh [of the Railway Labor Act] contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes." 367 U.S. at 764, 81 S.Ct. at 1797. Without explanation, appellants contend that this statement demonstrates the Court's intent to restrict a dissenting employee's support obligation to those specific union functions.

Language in other Supreme Court decisions supports a broader concept of collective bargaining. *Allen* refers to the obligation to support "activities *germane* to collective bargaining," 373 U.S. at 122, 83 S.Ct. at 1163 (emphasis added); *Abood* cited that language with approval, 431 U.S. at 239 n.40, 97 S.Ct. at 1802 n.40. *Hanson* noted that an employee has the duty to support the "work of the union *in the realm* of collective bargaining." 351 U.S. at 235, 76 S.Ct. at 719 (emphasis added). *Hanson* also acknowledged that Congress has the power "to require . . . the beneficiaries of trade unionism to contribute to its costs," *id.*, and specifically upheld "the requirement for financial support of the collective-bargaining agency by all who receive the benefits of its work." *Id.* at 238, 76 S.Ct. at 721. These words support a broader definition of the collective bargaining concept than that urged by appellants.

Abood recognized that "[t]here will, of course, be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." 431 U.S. at 236, 97 S.Ct. at 1800. In *Abood*, because the issues had not been fully briefed, the court declined to determine which of the activities in question might fall outside the union's duties as exclusive bargaining representative or involve constitutionally protected rights of association. 431 U.S. at 236 n.33, 97 S.Ct. at 1800, n.33.

[11] Supreme Court decisions thus have avoided delineating the boundaries of acceptable mandatory dues provisions in collective bargaining agreements. Circuit court decisions are equally silent on the subject. Based on our reading of *Hanson, Allen,* and *Abood,* however, we believe that the relevant inquiry is whether a particular challenged expenditure is germane to the union's work in the realm of collective bargaining. This formulation respects and protects dissenters' rights, but does not needlessly weaken the union, whose viability is necessary to secure and maintain industrial peace.[5] Applying this test, we believe **[1073]** that the district

5. The only prior attempt by a court in this circuit to draw the line separating "political" expenditures from those related to collective bargaining was made in dictum in the

court was incorrect in holding that protesting employees cannot be charged for the union's operating expenditures at issue here. We now turn to an item-by-item analysis of the expenditures involved in this case.

A. *Grand Lodge Conventions*

[12] BRAC represents 200,000 employees throughout the country. The Grand Lodge is either in charge of or directly involved in negotiating the collective bargaining agreements pertaining to most of those employees. The quadrennial convention is an important forum for rank and file participation in determining the Grand Lodge's collective bargaining policies. For example, the major portion of a recent convention was devoted to reports, debates, and voting on contract bargaining, grievance handling, and employee wage and benefit issues. Other significant items of business included the election of national officers and decisions concerning the union's internal structure and fiscal management. Such activities guide the union's approach to collective bargaining and are directly related to its effectiveness in negotiating labor agreements.[6]

district court's decision in *Seay v. McDonnell Douglas Corp.*, 371 F.Supp. 754, 761-62 n.7 (C.D.Cal. 1973), (Pregerson, J.) *rev'd on other grounds*, 533 F.2d 1126 (9th Cir. 1976). There, the court described a range of "political" expenditures to which an objecting employee could not be required to contribute. The court based its test on the holdings of *Street* and *Allen* and on an analysis of similar provisions in the British Trade Union Act appended to the *Allen* decision. The excluded political expenditures were:

> One, for payments to or on behalf of any candidate for public office in connection with his campaign for election to such public office, or
>
> Two, for payments to or on behalf of any political party or organization, or
>
> Three, for the holding of any meeting or the printing or distribution of any literature or documents in support of any such candidate or political party or organization . . . .

Id. Any other expenditures, the court concluded, "regardless of their political nature," would be "sufficiently germane to collective bargaining to require dissenting employees who are subject to union shop or agency fee agreements to bear their share of the burden." *Id.* The *Seay* formulation thus specifically defines "political" expenditures and excludes only those items from an employee's dues-paying obligation.

This test has been quoted in a recent treatise, R. Gorman, *Labor Law* 659 (1977) and in a recent casebook, A. Cox, *et al.*, *Labor Law* 1184-85 (1977). We find it unnecessary to embrace *Seay's* test because we conclude that the union's operating expenditures in question here are not just non-political and non-ideological, but can be justified individually as germane to the work of the union in the realm of collective bargaining.

6. Furthermore, the convention achieves compliance with Section 401(a) of the Labor-Reporting and Disclosure Act, 29 U.S.C. § 481(a), which requires unions to elect officers at least once every five years by referendum or convention. Like most other national unions, BRAC elects at conventions rather than by referendum. BRAC asserts that the convention is more workable than the referendum option, which takes more time away from union business for campaigning, and ultimately can cost more. It would lead to highly anomalous results if federal legislation made conventions necessary but federal courts did not require employees to contribute to convention costs.

B. *Grand Lodge Litigation*

Paragraph 22 exempts the vast majority of the union's litigation expenditures from protesting employees' dues obligations. While the exempted cases did not pertain to any specific collective bargaining agreement or grievance, they did involve such things as: the union's challenge to the legality of the airline industry's Mutual Aid Pact, under which a struck carrier receives substantial financial assistance from non-struck carriers; the protection of employees' rights during bankruptcy proceedings involving an employer; the doctrine of fair representation; and the defense of suits alleging violation of the non-discrimination requirements of Title VII.

The aim of the Mutual Aid Pact litigation was to strengthen the union's ultimate collective bargaining weapon—the ability to engage in an effective strike, which is thwarted considerably if the struck carrier continues to receive substantial income from non-struck carriers.

[1074] In several cases, BRAC's intervention in an employer's bankruptcy proceedings protected the union members' wages and ensured continued compliance with the collective bargaining agreement while the employer underwent reorganization.

The district court's ruling would give objecting employees a free ride as to these non-political expenses, which are related to the union's work as the collective bargaining agent.

C. *Grand Lodge Publications*

The monthly magazine of the Grand Lodge is the union's primary means of communicating information concerning collective bargaining, contract administration, and employees' rights to employees represented by BRAC. Recent articles have reported the initiation and outcome of negotiations, explained contract demands, announced a strike ballot, and discussed issues involved in a potential strike. In addition, the magazine reports on significant events for individual System Boards—including the announcement of a pact with Western Airlines. The publication also has given advice concerning unemployment and health benefits, annuity rights, and insurance. While the magazine also includes general and recreational materials to make it more readable, that fact does not detract from the publication's value in the collective bargaining process. It would be extremely difficult for a union to represent employees without an effective means of communication.

D. *Grand Lodge Social Activities*

The union purchases refreshments for business meetings and occasional social activities, which are open to non-member agency fee payers as well as union members. Only miniscule amounts of money—approximately .70 of one percent of Grand Lodge expenditures—are involved. These small expenditures are important to the union's members because they bring about harmonious working relationships, promote closer ties among employees, and create a more pleasant environment for union meetings. For these reasons, we believe that these costs are germane to the work of the union in the realm of collective bargaining.

E. *Grand Lodge Death Benefits*

Death benefit plans have historically played an important role in labor organizations. Indeed, many unions originated as mutual benefit societies.

In addition, insurance benefits are a mandatory subject of collective bargaining. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). If BRAC chooses to provide death benefits itself for all employees, rather than to seek such benefits from the employer, it is then in a better position to negotiate for additional benefits or higher wages.

Moreover, the negative consequences of permitting employees to withdraw from participation in the program are potentially quite great. If low-risk employees—the younger, healthier employees with longer life spans—could opt out, the financial stability of the program would be threatened by the number of claims coming from the remaining high-risk, older employees. Thus, provision of a death benefits plan, which tends to strengthen the employees' ties to the union, is germane to the work of the union within the realm of collective bargaining.

F. *Grand Lodge Organizing Efforts*

Maximum organization of an industry benefits employees and units already organized. A union is considerably stregthened if it eliminates competition from non-union employers and a stronger union is unquestionably a more effective collective bargaining agent. Successful organizing efforts thus can strengthen the union's position at the collective bargaining table immeasurably.

CONCLUSION

As the above discussion demonstrates, each of the challenged expenditures can be seen to promote, support or maintain the union as an

effective collective bargaining **[1075]** agent and therefore such expenditures are germane to the work of the union in the realm of collective bargaining. The district court is instructed to enter judgment in favor of BRAC and to conduct any further proceedings necessary to comply with this opinion.

AFFIRMED in part; REVERSED in part; REMANDED.

WHELAN, District Judge, dissenting:

I dissent. I would affirm the trial judge in every respect.

Where I differ from the majority is that I would affirm that part of the trial court's judgment which held that the appellants were not required to contribute to the expenditures made by the Grand Lodge of defendant Union, which are listed in paragraph 22 of the Court's findings of undisputed material facts and conclusions of law decided on the motion for summary judgment, as the same was amended in the order amending summary judgment, which amending order amended paragraph 22 of such undisputed material facts. Such amendment substituted a new subparagraph 10 in place of the old subparagraph 10. The new subparagraph 10 of paragraph 22 reads:

"(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

The majority reverses the decision of the trial court with respect to paragraph 22 just mentioned.

The activities which are listed in paragraph 22 as amended are set forth verbatim:

"22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.

(2) Operation of a death benefit program.

(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.

(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:

(a) employees not employed by Western Airlines;

(b) employees not employed in the air transportation industry;

(c) employees not employed in other transportation industries.

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.

(6) Contributions to charities and individuals.

(7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.

(8) Conducting and attending conventions of BRAC.

(9) Conducting and attending conventions of other organizations and/or labor unions.

(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines.

(11) Support for or opposition to proposed, pending, or existing legislative measures.

(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions."

The opinion of the majority seems to base its reasoning on what, to this member of the Court, is an erroneous conception of the **[1076]** law. The majority opinion relies on the language of the District Court opinion in *Seay v. McDonnell Douglas Corporation, et al.*, 371 F.Supp. 754, 761 (C.D.Cal.1973). The *Seay* case was appealed to the Ninth Circuit, and the Ninth Circuit reversed the summary judgment granted to the Union. The trial judge in his memorandum of decision granting summary judgment cited an earlier decision in the same action wherein the trial judge in such earlier decision had ruled that the only union expenditures to which non-union employees did not have to contribute were for payments to or on behalf of any candidate for public office or to or on behalf of any political party or organization or for the holding of any meeting or printing or distribution of any literature in support of any such candidate or political party or organization. The trial judge in this latter case stated, as appears in the footnote in 371 F.Supp. 754, 762, that expenditures for other purposes, regardless of their political nature, would be expenditures to which non-union employees must contribute. This member of the Court considers that such a rule would be violative of a non-union member's right to be free from association and that, in fact, such a rule is violative of the First Amendment right of appellants.

This member of the Court considers that the majority misreads what has been said or held by the Supreme Court concerning union expenditures to

which non-union employees must contribute. The Supreme Court has, of course, ruled that non-union employees are required to contribute to expenditures having to do with the negotiation, administration or enforcement of the collective bargaining agreement with Western Airlines, in this instance, as well as expenditures which are germane to collective bargaining. It is submitted that the meaning of "germane to collective bargaining" refers to the collective bargaining agreement, in this instance, the collective bargaining agreement with Western Airlines. Also, it would seem that "germane" should be considered as meaning closely related to the collective bargaining agreement with Western Airlines in this instance.

The majority would seem to have completely ignored the language of the Supreme Court in *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 754, 83 S.Ct. 1461, 1465, 10 L.Ed.2d 678 (1963). Also, the majority would seem to ignore the suggestions implicit in such language—to wit, that a non-union dissident employee cannot be required to contribute to pay institutional expenses of the union. The Supreme Court states that such institutional expenses are those things which the members authorize the union to do in their interests and on their behalf. It would seem to this member of the Court that the activities identified in paragraph 22 are such institutional activities.

Furthermore, the Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, at page 236, 97 S.Ct. 1782, at page 1800, 52 L.Ed.2d 261, states that expenditures of the union in ideological activities unrelated to collective bargaining are prohibited as expenditures to which the dissident non-union employee must contribute. It is submitted that the activities set forth in paragraph 22 are clearly activities to which dissident non-union employees need not contribute.

Findings of Undisputed Facts and Conclusions of Law of the U.S. District Court for the Southern District of California, Entered January 21, 1976

78 Lab. Cas. par. 11,290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	Civil No. 73-113-N Consolidated with Civil No. 73-118-N FINDINGS OF UNDISPUTED FACTS AND CONCLUSIONS OF LAW
ALLAN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	

This cause came on regularly for hearing and consideration before the Honorable Leland C. Nielsen on the motion of the plaintiffs, Howard Ellis, et al., Allan Fails, et al., individually and as class representatives, for summary judgment in the above entitled and consolidated cases, pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court, having considered said motion and the opposition of defendants thereto, and having examined and considered the entire record in the matter, including the pleadings, depositions, affidavits, and [2] memoranda filed in support of and in opposition to the said motion, the Court now finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiffs at the commencement of these actions were citizens of the United States, residing in the State of California and employed by Western Airlines at various locations in the State of California, including Los Angeles, San Francisco and San Diego.

2. Defendants Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees and its subsidiary organizations, System Board of Adjustment No. 451, Skyliner Lodge Local 3001, Sky Harbor Lodge Local 3014, and Arrowliner Lodge Local 3049, are unincorporated associations and labor organizations whose purpose, in part, is the representation of employees for collective bargaining over wages, hours and working conditions within the meaning of Section Two of the Railway Labor Act. Defendant California State Legislative Committee of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees is an unincorporated association, subsidiary to and affiliated with the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees, which has as its purpose, in part, the sponsorship of legislation in the State of California. Defendants are hereinafter collectively referred to as "BRAC".

3. Defendants Local Lodges 3001, 3014 and 3049 are subsidiary to Defendant System Board No. 451, which is in turn subsidiary to the Grand Lodge of the Brotherhood of Railway, Airline and Steamship Clerks.

4. Western Airlines is a corporation authorized to and doing business in the State of California, engaged in [3] the transportation of passengers and freight in interstate commerce.

5. At all times material, Western Airlines has maintained a collective bargaining relationship with BRAC governing the terms and conditions of employment of plaintiffs and Fails class members and BRAC has been, and is, the exclusive bargaining agent for the craft or class of employees in which they are employed.

6. Under the terms of the collective bargaining agreement in effect between Western Airlines and BRAC, effective October 1, 1969, and the Letters of Agreement of October 27, 1966 and February 26, 1971, made a part of and incorporated into the collective bargaining agreement, each employee in a classification under the agreement was required to acquire and maintain membership in BRAC as a condition of employment after completion of the sixtieth day of employment, except that employees who were hired prior to October 27, 1966 and were not members as of that date were not required to acquire and maintain membership but only to tender

to BRAC an agency fee equal to the initiation fee and monthly dues uniformly imposed on union members.

7. A communication issued by BRAC International President C. L. Dennis and published in the November, 1975 issue of the *Railway Clerk/ interchange* construed the BRAC Constitution as not requiring any employe represented by BRAC to become a formal union member as a condition for retaining his job rights or for qualifying for other generally available union benefits.

8. Plaintiffs Fails, Frost, Johnson, Erkman, Taylor, Brown, Nelson, Damante, Ryan, Grote, Ballard, Young, Douglas, Emminger and Wisor, hereinafter collectively referred to as the "Fails plaintiffs" are or have been members of defendant **[4]** BRAC, employed by Western Airlines. On March 23, 1973, the Fails plaintiffs filed Case No. 73-118-N, for themselves and as class representatives.

9. The Fails plaintiffs' motion for determination of class action determination of all issues was granted in orders entered by this Court dated September 14, 1973 and April 8, 1975. The class includes all BRAC members employed or formerly employed by Western Airlines who submitted written objections as stated in paragraph 13 of the Fails complaint. Subsequent references to the "Fails plaintiffs" include the the class members.

10. Plaintiffs Ellis, Balian, Sauls, Dean, Payne, Fontaine, and Loudin, hereinafter collectively referred to as the "Ellis plaintiffs," are or have been employees of Western Airlines who have declined to become members of defendant BRAC, but who have been obligated, as a condition of their employment, to tender agency fees to defendant BRAC equivalent to the membership dues and fees paid by members of defendant BRAC. On March 20, 1973, the Ellis plaintiffs filed Case No. 73-113-N.

11. Subsequent references to "the plaintiffs" include the Ellis plaintiffs, the Fails plaintiffs, and the Fails class members.

12. Except for the class allegations in Case No. 73-118-N, the allegations of the two complaints are essentially the same. The plaintiffs alleged that defendant BRAC expended compulsory dues and fees exacted from plaintiffs, over their written objections, for political and various other non-collective bargaining purposes. Plaintiffs alleged that these expenditures over their objections deprived them of their rights under the Railway Labor Act and the First, Fifth and Ninth Amendments to the United States Constitution, and constituted a breach by defendant BRAC of its duty of fair **[5]** representation owed to plaintiffs. Plaintiffs further alleged that defendant BRAC's existing three and one-third cents dues

reduction procedure was unavailable to plaintiffs and further that the procedure was arbitrary and discriminatory because it did not correlate with defendants' political and ideological expenditures. Plaintiffs sought declaratory and injunctive relief, money damages, attorneys' fees, and costs.

13. Plaintiffs and those class members falling within the territorial jurisdiction of the Defendant Local Lodges 3001, 3014 and 3049 pay dues and fees to the appropriate Local Lodge, to System Board No. 451, and to the Grand Lodge. Each Local Lodge remits 30 cents per person per month to the California State Legislative Committee. The remaining class members pay dues and fees to Local Lodges in their area, to System Board No. 451, and to the Grand Lodge. Thirty cents per month from their dues and fees is similarly sent to a State Legislative Committee.

14. Each plaintiff and class member has sent a written protest to BRAC, objecting to the contractual requirement compelling the payment of wages as union dues and fees. The language of each such protest is as follows:

> As an employee of Western Airlines, I feel that the Brotherhood of Railway, Airline and Steamship Clerks does not properly represent my interests and I protest the compulsory "agency fee" I must pay the Brotherhood of Railway, Airline and Steamship Clerks, in order to retain my job. In addition, I hereby protest the use of these fees for any purpose other than the cost of collective gargaining [*sic*] and specifically protest the support of Legislative goals, candidates for political office, political efforts of any kind or nature, ideological causes, and any other activity **[6]** which is not a direct cost of collective gargaining [*sic*] on my behalf. I demand an accounting and refund from the Brotherhood of Railway, Airline and Steamship Clerks of all fees exacted from me by the so-called "agency fee".

15. Each such protest was sent by certified mail. In some instances, delivery was refused; in others, the letters were discarded; in still others, the letters were received but not opened. Defendants did not respond to any of these protest letters.

16. When the protest letters were sent by plaintiffs, the BRAC Constitution contained the following refund device:

> **Any member who does not desire to contribute to the Legislative Fund Account may have his dues reduced three and one-third (3-1/3) cents per month, by notifying his Financial Secretary in writing and paying his dues direct to said Financial Secretary. Reduction in dues become effective with the month following the month in which the**

member notifies the Financial Secretary in writing and cannot be retroactive. The Financial Secretary will acknowledge receipt of notice.

17. None of the plaintiffs' dues were reduced or refunded in the amount set forth in the BRAC Constitution. Plaintiff Ellis specifically requested the 3-1/3 cents per month reduction, but was told that non-members could not participate in the reduction scheme.

18. Approximately nine months after these suits were commenced, BRAC promulgated a Policy Statement (dated January 24, 1974) which established a procedure whereby objecting members and agency fee payers could secure a refund of that portion of their dues and fees which was expended upon **[7]** "political purposes not germane to collective bargaining." Plaintiffs thereupon sought and obtained leave to amend their complaints.

19. The amendments allege that provisions of the Policy Statement are inconsistent with those of the BRAC Constitution, and that the Policy Statement is consequently invalid, as it was not adopted as a constitutional amendment. It is charged that the Policy Statement is part of a continuing bad faith effort by BRAC to deprive plaintiffs of constitutional and statutory rights. In addition to the relief requested in the complaints, plaintiffs pray:

(1) for an order determining that the adoption of the Policy Statement is void;

(2) for an order restraining defendants from subjecting persons represented by BRAC to the Policy Statement;

(3) for an order releasing objectors from any obligation to pay dues, fees, or assessments to defendants or any subordinate or affiliated organizations as a condition of employment;

(4) for damages, attorneys' fees, costs, and such other relief as the Court may deem proper.

20. Defendants raise the following affirmative defenses to the complaints, as amended:

(1) failure to state a claim upon which relief may be granted;

(2) failure to exhaust internal and administrative remedies;

(3) the bar of various statutes of limitations;

[8] **(4) preemption by the System Board of Adjustment, with regard to those claims arising out of the interpretation or application of the collective bargaining agreement.**

21. Case No. 73-113-N and Case No. 73-118-N, pursuant to the stipulation of the parties and the order of this Court, have been consolidated for purposes of discovery and trial.

22. BRAC has engaged in the following activities since June 30, 1972:

(1) Recreational, social and entertainment expenses for activities not attended by management personnel of Western Airlines.

(2) Operation of a death benefit program.

(3) Organizing and recruiting new members for BRAC among Western Airlines bargaining unit employees.

(4) Organizing and recruiting new members for BRAC, and/or seeking collective bargaining authority or recognition for:

(a) employees not employed by Western Airlines;

(b) employees not employed in the air transportation industry;

(c) employees not employed in other transportation industries.

(5) Publications in which substantial coverage is devoted to general news, recreational and social activities, political and legislative matters, and cartoons.

(6) Contributions to charities and individuals.

[9] (7) Programs to provide insurance, and medical and legal services to the BRAC membership, or portions thereof, other than such programs secured for its salaried officers and employees.

(8) Conducting and attending conventions of BRAC.

(9) Conducting and attending conventions of other organizations and/or labor unions.

(10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC.

(11) Support for or opposition to proposed, pending, or existing legislative measures.

(12) Support for or opposition to proposed, pending, or existing governmental executive orders, policies, or decisions.

23. Funds for the activities listed in paragraph 23 are derived in part from the dues and fees plaintiffs are compelled to pay BRAC.

24. A portion of plaintiffs' payments to the Grand Lodge are placed in general fund accounts. The defendants have been affiliated with various

non-BRAC organizations at times material hereto, and have contributed amounts from general funds to said organizations. Included among those organizations are:

> the AFL-CIO, the Canadian Labour Congress, the Congress of Railway Unions, the Council of AFL-CIO Unions for Professional Employees, **[10]** the Union Label and Service Trade Department of the AFL-CIO, and Canadian Railway Office of Arbitration, the Canadian Railway Labour Association, the Cooperating Railway Labor Organizations, the Canadian Non-Operating Railway Unions, and the San Diego-Imperial Counties Labor Council.

The foregoing non-BRAC organizations engage in fraternal, social, and political activities; and they espouse positions on economic and ideological issues, through publications and other means.

25. The Railway Clerks Political League (RCPL) is an unincorporated association affiliated with BRAC. Its officers are all BRAC officers, and its activities are conducted by officers and employees of BRAC, whose compensation is paid entirely by BRAC. Office space, computer services, and other operating supplies and facilities are provided by BRAC at no charge. The funds for such undertakings are derived from the BRAC General Fund, into which a portion of plaintiffs' dues and fees is commingled.

26. The RCPL supports or opposes political candidates, causes and legislation.

27. Funds for the RCPL are solicited by paid officers and employees of the Grand Lodge of BRAC and its subordinate and affiliated organizations, including the remaining defendants. These fund-raising activities include publications in the BRAC magazine, *Railway Clerk/interchange*, and personal appeals at System Board and local lodge meetings. The direct and indirect costs of such fund-raising activities are paid by BRAC from general funds, and RCPL makes no reimbursement therefor.

[11] 28. Some amounts collected for RCPL are transmitted through the General Fund accounts of the Defendant Local Lodges, System Board #451, and Grand Lodge. RCPL funds have been utilized for the payment of employee salaries and other BRAC Grand Lodge operating expenses since prior to January 1, 1972.

29. BRAC has incurred costs for political activities from its General Fund for at least five to ten years.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties hereto, and over the subject matter hereof, under 28 U.S.C. § 1337.

2. Fails et al. v. BRAC, Case No. 73-118-N, is properly brought as a class action.

3. BRAC owes each plaintiff the fiduciary duty of fair representation.

4. Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 *et seq.*, as construed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740, 81 S.Ct. 1784 (1961), is intended to force all employes covered by the Act to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes.

5. The Railway Labor Act prohibits the use of fees and dues for non-collective bargaining purposes and activities, over protest from a represented employe.

6. Those activities listed in Paragraph 22 of the Findings of Fact are non-collective bargaining activities as that term is defined in *Street, supra.*

7. BRAC's use of dues and fees of protesting employes for non-collective bargaining activities and purposes **[12]** constitutes a breach of the fiduciary duty of fair representation BRAC owes to each plaintiff.

8. BRAC has further breached its duty of fair representation of plaintiffs by the following:

(1) refusing delivery of some of plaintiffs' protest letters, discarding some letters, and ignoring the balance of such letters;

(2) failing to make dues reductions of 3-1/3 cents per month to Fails plaintiffs and class members, as provided in the BRAC Constitution;

(3) excluding agency payers such as plaintiff Ellis from eligibility for the 3-1/3 cents dues reduction because of their non-membership;

(4) maintaining provisions in its constitutions (1967 and 1971) which were not good faith efforts to comply with its lawful obligations.

Dated: January 20, 1976.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Interlocutory Summary Judgment of the U.S. District Court for the Southern District of California, Entered January 21, 1976

78 Lab. Cas. par. 11,290

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants.

Civil No. 73-113-N
Consolidated with
Civil No. 73-118-N

INTERLOCUTORY SUMMARY JUDGMENT

ALLAN FAILS, et al.,
Plaintiffs,
v.
BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al.,
Defendants.

In accordance with the Findings of Fact and Conclusions of Law in this matter and with Rule 56(c) of the Federal Rules of Civil Procedure, and the Court having determined that there are no genuine issues of material fact as to the issue of liability alone,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That an interlocutory summary judgment be entered for the plaintiffs and Fails class members (hereinafter [2] collectively referred to as

"plaintiffs") as to the issue of liability alone, the Court having found defendants to have breached their duty of fair representation as more fully set forth in the Findings of Fact and Conclusions of Law;

2. That summary judgment be denied as to each and every issue of damages, all such issues to be determined according to evidence to be presented at the trial phase of this litigation; and

3. That the pretrial conference for this litigation be held on May 3, 1976; all parties to conform to the dictates of Rule 9 of the Local Rules of Civil Procedure, Southern District of California.

SO ORDERED.

Dated: January 20, 1976.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Order Amending Interlocutory Summary Judgment of the U.S. District Court for the Southern District of California, Entered November 29, 1976

79 Lab. Cas. par. 11,765

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	CIVIL NO. 73-113-N Consolidated with CIVIL NO. 73-118-N
ALLEN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, et al., Defendants.	ORDER AMENDING INTERLOCUTORY SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION TO RELIEVE DEFENDANTS OF THE REQUIREMENT OF FURTHER ANSWER TO INTERROGATORY NUMBER FIVE

The Court entered an interlocutory summary judgment for plaintiffs dated January 21, 1976. In conjunction with that summary judgment, the Court stated among its findings of fact that:

> 22. BRAC has engaged in the following activities since June 30, 1972:
>
> * * *
>
> (10) Defense or prosecution of litigation not having as its subject matter the negotiation [2] or administration of collective

bargaining agreements or settlement or adjustment of grievances or disputes of employees represented by BRAC."

Subsequent to the rendition of the summary judgment, plaintiffs propounded a fifth series of interrogatories, of which Interogatory No. 5 sought to ascertain the expenditures of all organizations affiliated with BRAC for activities listed in Paragraph 22 of the Court's findings of fact. Defendants prepared and served a partial response, and on November 4, 1976, filed a motion to obtain relief from submitting further answers to that interrogatory.

Upon consideration of defendants' motion, the response filed by plaintiffs, the presentation of oral argument and related research, *the Court deems it appropriate*:

(a) *to clarify its earlier ruling so as to delimit the scope of costs chargeable against plaintiffs to those of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes incurred by the defendants in the representation of plaintiffs with Western Airlines*; and

(b) to relieve defendants of the requirement of further answer to Interrogatory Number 5.

IT IS THEREFORE ORDERED AND ADJUDGED that Paragraph 22 (10) of the Court's findings of fact issued in conjunction with the summary judgment dated January 21, 1976, be withdrawn, and the findings of fact, conclusions of law, and interlocutory summary judgment are hereby amended by substitution of the following finding of fact:

"22. BRAC has engaged in the following activities since June 30, 1972:

* * *

[3] (10) Defense or prosecution of litigation not having as its subject matter the negotiation or administration of collective bargaining agreements with Western Airlines, or settlement or adjustment of grievances or disputes of employees of Western Airlines."

AND IT IS FURTHER ORDERED AND ADJUDGED that defendants are relieved of the requirement of further answer to Interrogatory Number 5 in plaintiffs' fifth series of interrogatories.

DONE AND ORDERED THIS 29 day of November, 1976.

/s/ **Leland C. Nielsen**
LELAND C. NIELSEN, JUDGE

Findings of Fact and Conclusions of Law of the U.S. District Court for the Southern District of California, Entered March 14, 1980

88 Lab. Cas. par. 11,986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,

Defendants.

Civil No. 73-113-N

Consolidated with

Civil No. 73-118-N

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ALLEN FAILS, et al.,

Plaintiffs,

v.

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al.,

Defendants.

These consolidated actions came on for further trial on August 1, 1978, before the Honorable Leland C. Nielsen, U. S. District Judge, sitting without a jury. The plaintiffs were represented by Michael E. Merrill, Esq., Raymond L. [*sic*] LaJeunesse, Jr., Esq., and Hugh L. Reilly, Esq. The defendants were represented by Joseph L. Rauh, Jr., Esq., John Silard, Esq., Mary M. Levy, Esq., and Solomon I. Hirsh, Esq. The Court having heard **[2]** and considered the evidence, both oral and documentary, the

arguments of counsel, both oral and written, and now being fully advised, makes the following Findings of Fact and Conclusions of Law:

1. On January 21, 1976 this Court issued Findings of Fact, Conclusions of Law and an Interlocutory Summary Judgment on the liability issues, which judgment together with amendments of April 14, 1976, and November 29, 1976, are incorporated herein as if set forth at length.

2. On April 14, 1976, the Court certified its Interlocutory Summary Judgment for appeal, but the Court of Appeals denied hearing on said certification June 7, 1976.

3. The Findings of Fact and Conclusions of Law and the Interlocutory Summary Judgment were the framework for the trial commencing on August 1, 1978, as the pretrial order provided that these findings and conclusions "are conclusive and shall not be subject to challenge or supplementation by evidence or legal argument at the trial."

4. On October 6, 1975, BRAC adopted a rebate plan encompassing all political and legislative expenditures of the Grand Lodge and subordinate units, as well as all ideological expenditures and all dues and contributions to other labor federations, organizations and charities. That plan is a good-faith effort to comply with the requirements imposed by the United States Supreme Court in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), and *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963). The Grand Lodge Board of Trustees annually computes political-ideological rebates due to any protesting dues payer for the prior calendar year. These are computed on the basis of forms submitted by subordinate units and upon reports of political **[3]** time and expenditures by Grand Lodge personnel which are contemporaneously logged on the Grand Lodge computer system throughout the calendar year. Any employee who believes his rebate inadequate may appeal directly to an independent Public Review Board authorized to make final determinations on such appeals. Members of the Board include former Governor Edmund G. Brown, Dame Soia Mentschikoff and Reverend Preston Bradley.

The Board of Trustees' computation for calendar year 1975 disclosed that 4.68% of the Union's total income from dues and fees had been expended for items included in the rebate plan, and each plaintiff in this suit was sent a refund check for that proportion of his 1975 dues payment, as well as for each earlier year back to the date of his initial dues protest. The rebate computation for 1976 was 4.9%, and each plaintiff was then sent that amount for 1976 plus the amount necessary to increase to 4.9% the rebate for each prior year since his protest. Plaintiffs have also been

sent their rebates for 1977, amounting to 5.4% of their dues payments in that year. No plaintiff has appealed to the Public Review Board, although each has been advised of his right of appeal.

5. On the basis of the above finding, the Court concludes that plaintiffs' rights in the political-ideological area have been vindicated by the rebates they have received and are protected for the future by the rebate plan.

6. With respect to the area of expenditure defined in Paragraph 22 of the Interlocutory Summary Judgment, pre-1976 based upon defendants' stipulation, each plaintiff is awarded with interest his entire dues payment made or transmitted to the Grand Lodge from the date of his initial protest through December 31, 1975.

[4] 7. For calendar year 1976 each plaintiff is awarded with interest a return of 40.0% of his dues paid to the Grand Lodge.

8. For calendar year 1977 each plaintiff is awarded with interest 37.8% of his dues paid to the Grand Lodge in 1977.

9. These awards for 1976 and 1977 are based upon trial exhibits B and C and the supplements thereto, which the Court finds to have been supported by a preponderance of the evidence.

10. To comply with the requirements of the Railway Labor Act, defendants shall establish a system that reduces the dues payment obligation to the Grand Lodge of any plaintiff for each calendar year by the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year. To determine the annual reduction amount, defendants shall at once integrate Paragraph 22 data into the regular accounting records of the Grand Lodge which are subject to independent annual audit, and as concerns compensated time of officers and staff, such records shall be kept on the basis of a time study or other investigation establishing generally accepted accounting standards for allocating the compensated time and expenses of Grand Lodge personnel who engage in Paragraph 22 activity.

11. The testimony of the Local Lodge defendants and examinations of their books and records established by a preponderance of the evidence that the Locals engage in almost no Paragraph 22 activity and incur only minimal expenditures in Paragraph 22 areas other than political contributions and expenses which are already a part of the rebate plan. Upon the stipulation of the defendants, each plaintiff is awarded **[5]** a return of $1.00 per year from dues paid to his Local Lodge from the date of his original protest through 1977 and in each calendar year thereafter.

12. Testimony by officers and employees of defendant System Board and examination of the books, records and other exhibits establish by a preponderance of the evidence that, with the exception of the years 1975 and 1976, the System Board engages in little Paragraph 22 activity. Only minimal sums are spent on such activity, except items already rebated to the plaintiffs. Therefore, each plaintiff is awarded the sum of $4.14 per year from the System Board for the year 1975 and a similar amount for 1976, and upon stipulation of the defendant, each plaintiff is awarded a return of $1.00 per year from the date of his original protest through 1977 and each calendar year thereafter, except for 1975 and 1976.

13. The costs of defending this litigation are not a Paragraph 22 expenditure.

14. Plaintiffs are entitled to no return for any alleged waste on the part of defendants.

15. Upon stipulation of the defendants, strike benefits shall be paid to agency fee payers equally with regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

16. The plaintiffs shall recover the share of their dues allocable to the death benefit fund and will no longer be required to pay same, but shall be deemed to have waived any rights or benefits under that fund.

17. The plaintiffs are entitled to their costs of suit.

Dated: March 14, 1980.

/s/ Leland C. Nielsen
LELAND C. NIELSEN,
United States District Judge

Judgment of the U.S. District Court for the Southern District of California, Entered July 9, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HOWARD ELLIS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	Civil No. 73-113-N Consolidated with Civil No. 73-118-N JUDGMENT
ALLEN FAILS, et al., Plaintiffs, v. BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, et al., Defendants.	

In accordance with the Findings of Fact and Conclusions of Law entered by this Court on March 14, 1980,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Each plaintiff is awarded the sum next to said plaintiff's name in Attachment A hereto for expenditures made by defendants on the activities set forth in Paragraph 22 [2] of the Interlocutory Summary Judgment (other than expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975) for the period from the date of initial protest through December 31, 1977.

2. For the period from January 1, 1978, to date of Judgment, each plaintiff is awarded, with interest, a sum equal to said plaintiff's share of the expenditures made by defendants on Paragraph 22 activities (other than expenditures which are already a part of the political-ideological rebate plan adopted on October 6, 1975).

3. Defendants are directed to establish a system that reduces the dues payment obligation of any plaintiff for each calendar year by $2.00 per year plus the proportion of Grand Lodge expenditures determined by defendants to have been spent for Paragraph 22 functions and the rebates in the political-ideological areas in the preceding calendar year and to determine the annual reduction amount for the Grand Lodge in accordance with the provisions of Paragraph 10 of the Findings of Fact and Conclusions of Law of March 14, 1980.

4. As stipulated by defendants, strike benefits shall be paid to agency fee payers equally with the regular members with no requirement being imposed upon such persons or any other plaintiff other than that of refraining from working for Western Airlines during the time for which said benefits are paid.

5. Since each plaintiff is awarded a recovery of the share of their dues allocable to the death benefit fund under Paragraphs 1 and 2 hereof and will no longer be required to pay same under Paragraph 3 hereof, plaintiffs shall be deemed to have waived any rights or benefits under that fund.

6. Plaintiffs are entitled to their costs of suit.

7. Defendants have repeatedly made clear their [3] intention to appeal this Court's ruling in the Interlocutory Summary Judgment that all expenditures made by defendants on Paragraph 22 activities fall outside the area of collective bargaining and this Court having determined that this is a controlling and important question of law not yet settled by the appellate courts, this Judgment is stayed until final appellate review herein upon the

condition that defendants present to this Court, within 10 days, and this Court approves, an appropriate supersedeas bond.

7-7-80

/s/ Leland C. Nielsen
LELAND C. NIELSEN
UNITED STATES DISTRICT JUDGE

Approved as to form:

Michael E. Merrill
Attorney for Plaintiffs

/s/ Joseph L. Rauh, Jr.
Joseph L. Rauh, Jr.
Attorney for Defendants

[Attachment A to Judgment omitted.]

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment to the United States Constitution:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

Railway Labor Act § 2, Eleventh, 45 U.S.C. § 152, Eleventh (1976):

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

APPENDIX C

LIST OF PENDING CASES IN WHICH THE LINE BETWEEN PERMISSIBLE AND IMPERMISSIBLE EXPENDITURES FROM COMPULSORY UNION DUES OR FEES IS, OR WILL BE, AT ISSUE

California:

Bianchini v. California School Employees Association, No. SF-CO-157 (Cal. Pub. Empl. Rel. Bd. filed Sept. 29, 1981) (2 consolidated cases).

Cumero v. King City High School District Association, 962 Gov't Empl. Rel. Rep. (BNA) 15 (Cal. Pub. Empl. Rel. Bd., Mar. 3, 1982), *appeal docketed*, 1 Civ. No. AO16723 (Cal. Ct. App., 1st Dist., Apr. 1, 1982).

Link v. Antioch Unified School District, No. SF-CE-494 (Cal. Pub. Empl. Rel. Bd. filed Sept. 24, 1980) (4 consolidated cases).

Mills v. Chico Unified Teachers Association, No. S-CO-47 (Cal. Pub. Empl. Rel. Bd. filed Jan. 24, 1980).

Hawaii:

Jensen v. Yonamine, 437 F.Supp. 368 (D. Hawaii 1977) (order abstaining pending state court determination), *state court proceedings sub nom. Aio v. Hamada*, No. SF-05-42 (Hawaii Pub. Empl. Rel. Bd. Jun. 13, 1980), *aff'd*, No. 62067 (Hawaii 1st Cir. Ct. Dec. 22, 1981), *appeal docketed*, No. 8663 (Hawaii Jan. 21, 1982).

Maine:

Associated Faculties v. Alberni, No. 80-995 (Portland, Me., Super. Ct. filed July 21, 1980) (and 52 similar cases filed same date).

Teamsters Local Union No. 48 v. Patrick, No. CU-82-73 (Penobscot County, Me., Super. Ct. filed Feb. 3, 1982).

Maryland:

Beck v. Communications Workers of America, 106 L.R.R.M. 2323 (D. Md. 1981) (recommitting to Special Master).

Massachusetts:

Bates v. Massachusetts Labor Relations Commission, No. 80-1740 (Hampden County, Mass., Super. Ct. filed June 10, 1980).

Becker v. Massachusetts Society of Professors, Boston Chapter, No. MUPL-2200 (Mass. Lab. Rel. Comm'n filed Apr. 13, 1982).

Burchell v. New Bedford Educators Association, No. MUPL-2486 (Mass. Lab. Rel. Comm'n filed May 6, 1982) (12 consolidated cases).

Greenfield School Committee v. Greenfield Education Association, No. MUPL-2494 (Mass. Lab. Rel. Comm'n filed May 10, 1982), *on referral from* No. 14646 (Franklin County, Mass., Super. Ct. Dec. 2, 1980), *on remand from* 385 Mass. 70, 431 N.E.2d 180 (1982).

Herbst v. Educational Association, No. MUPL-2488 (Mass. Lab. Rel. Comm'n filed May 6, 1982).

Michigan:

Abood v. Detroit Board of Education, No. 155255 (Wayne County, Mich., Cir. Ct. filed Apr. 4, 1970), *on remand from* 431 U.S. 209 (1977) (3 consolidated cases).

Acker v. Homer Board of Education, No. 80-115 CZ (Calhoun County, Mich., Cir. Ct. filed Jan. 30, 1980).

Ball v. City of Detroit, No. 70-159940-CZ (Wayne County, Mich., Cir. Ct. filed Jun. 29, 1970), *on remand from* 84 Mich. App. 383, 269 N.W.2d 607 (1978).

Bebermeyer v. Michigan State Employees Association, ULP 81-40-35 (Mich. Civ. Serv. Comm'n filed Oct. 27, 1981).

Central Michigan University Faculty Association v. Stengren, No. 76-006456-CZ (Isabella County, Mich., Cir. Ct. filed May 7, 1976).

Irwin v. Michigan Nurses Association, No. CU 82-D16 (Mich. Empl. Rel. Comm'n filed Apr. 30, 1982).

Kalamazoo County Education Association v. Reisterer, No. C82-100195-CK (Kalamazoo County, Mich., Cir. Ct. filed Jan. 21, 1982).

Lehnert v. Ferris Faculty Association, No. G78-346 CA 1 (W.D. Mich. Aug. 11, 1982) (denying summary judgment).

White Cloud Education Association v. Board of Education, 101 Mich. App. 309, 300 N.W.2d 551 (1980), *appeal docketed*, No. 66754 (Mich. Mar. 2, 1981).

New Jersey:

Kramer v. Boonton Education Association, No. CI-82-21-123 (N.J. Pub. Empl. Rel. Comm'n filed Nov. 16, 1981).

Olsen v. Communication Workers of America, No. 82-3443 (D.N.J. filed Oct. 3, 1982).

Robinson v. New Jersey, 1981-83 Pub. Bargaining Cas. (CCH) par. 37,624 (D.N.J. Sept. 28, 1982) (order granting preliminary injunction) (2 consolidated cases).

New York:

Haag v. Churchville-Chili Education Association, No. 12665/80 (Monroe County, N.Y., Sup. Ct. filed Aug. 28, 1980).

Havas v. Communications Workers of America, 509 F.Supp. 144 (N.D.N.Y. 1981) (partial summary judgment).

Ohio:

Collins v. Youngstown State University Chapter of Ohio Civil Service Employees' Association, No. 79-CB-798 (Mahoning County, Ohio, C.P. filed Apr. 23, 1979), *on remand from* Case No. 79 C.A. 110 (Ohio Ct. App., 7th Dist., Apr. 14, 1981).

Pymatuning Valley Education Association v. Daniel, No. 82 CVF 374 (Ashtabula, Ohio, County Ct. filed Aug. 3, 1982) (3 consolidated cases).

Youngstown State University Chapter of Ohio Education Association v. Ritter, No. 81-CV-885 (Mahoning County, Ohio, C.P. filed May 29, 1981) (and 3 other cases filed same date).

Washington:

Hordyk v. International Brotherhood of Teamsters, No. 51368 (Thurston County, Wash., Super. Ct. Jul. 31, 1979) (interlocutory decision as to liability).

Wisconsin:

Browne v. Milwaukee Board of School Directors, Case XCIX No. 23535 MP-892 (Wis. Empl. Rel. Comm'n Feb. 3, 1981) (initial findings and conclusions), *on referral from* No. 410-584 (Milwaukee County, Wis., Cir. Ct. Aug. 22, 1977), *on remand from* 83 Wis.2d 316, 265 N.W.2d 559, 267 N.W.2d 379 (1978).

Chentnik v. Richfield Education Association, Case I No 27171 MP-1176 (Wis. Empl. Rel. Comm'n filed Dec. 31, 1980).

Gerleman v. Milwaukee Board of School Directors, Case C No. 23558 MP-897 (Wis. Empl. Rel. Comm'n May 24, 1982) (initial findings and conclusions), *on referral from* No. 416-740 (Milwaukee County, Wis., Cir. Ct. Aug. 22, 1977).

Johnson v. County of Milwaukee, Case CLXI No. 29581 MP-1322 (Wis. Empl. Rel. Comm'n filed Mar. 19, 1982), *on referral from* No. 411-578 (Milwaukee County, Wis., Cir. Ct. Dec. 12, 1978).